

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEVE L. LYONS

Claimant

VS.

IBP, INC.

Self-Insured Respondent

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Docket No. 251,250

ORDER

Respondent requested review of the August 6, 2003 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on February 3, 2004.

APPEARANCES

Judy A. Pope of Topeka, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that the claimant's average weekly wage increased from \$485.43 to \$496.17 effective September 16, 2000.

ISSUES

It was undisputed that claimant suffered an accidental injury arising out of and in the course of his employment with respondent on July 10, 1999. The Administrative Law Judge (ALJ) found the claimant to be realistically and essentially unemployable and determined claimant was permanently and totally disabled.

The respondent requests review of the following: (1) nature and extent of disability; (2) whether the respondent is entitled to a credit pursuant to K.S.A. 44-501(c) for a preexisting functional impairment; and, (3) whether the respondent is entitled to a credit for overpayment of temporary total disability benefits.

Respondent argues the claimant retains the ability to perform substantial and gainful employment and therefore should only be entitled to a 65 percent work disability. Respondent further argues the claimant suffered an aggravation of a preexisting condition and therefore respondent is entitled to a credit pursuant to K.S.A. 44-501(c). Respondent further argues the claimant had reached maximum medical improvement as of September 9, 2002, and was not entitled to temporary total disability compensation after that date.

Claimant requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

In May 1990, while working for another employer, claimant injured his cervical spine. As a result of that work-related accident, claimant was diagnosed with a left central disk herniation at C5-6. On October 4, 1990, claimant underwent an anterior cervical discectomy at C5-6.

Claimant commenced working for respondent on November 16, 1998. Claimant had successfully recovered from his May 1990 injury and was able to perform heavy full-time work for the respondent until July 10, 1999. On July 10, 1999, claimant injured his low back and neck while working for the respondent lifting a motor and gear box. Respondent provided claimant medical treatment with orthopedic surgeon Dr. William O. Reed Jr. of Shawnee Mission, Kansas.

Dr. Reed first saw claimant on August 9, 1999. Claimant complained of low back and left leg pain. Dr. Reed's physical examination of claimant revealed abnormal reflexes in the lower extremity which did not necessarily correspond with involvement of a single nerve root. Dr. Reed noted the claimant's physical examination was indicative of long tract signs which he defined as abnormal reflexes in the lower extremity caused by abnormalities of the motor nerves potentially beginning in the brain and traveling all the way through the spinal cord down to the lower extremities. As a result of his findings upon physical examination of the claimant, Dr. Reed had claimant undergo an MRI examination of the cervical and thoracic spine to rule out any other spinal cord abnormalities that could be the cause of the clonus found in claimant's lower extremities.

The thoracic MRI scan was unremarkable. But the cervical MRI scan was extremely remarkable showing the C5-6 osseous fusion and a large herniated disk as well as severe canal stenosis at C4-5. Dr. Reed opined that this area of compression of the spinal cord was generating claimant's abnormal reflexes and loss of sensory and motor functions. On

October 3, 1999, Dr. Reed performed surgery on claimant which consisted of an anterior cervical discectomy and fusion at C4-5.

Dr. Reed continued to follow claimant and noted that after the surgery claimant initially experienced some relief but he later began to again experience discomfort in his neck as well as upper and lower extremities. On February 17, 2000, Dr. Reed performed an arthroscopic evaluation, decompression and rotator cuff repair on claimant's left shoulder. Although Dr. Reed initially determined claimant had reached maximum medical improvement on April 17, 2000, the claimant returned to the doctor with complaints regarding both his upper and lower extremities.

Dr. Reed ordered an EMG on March 15, 2001, which detected abnormalities in both of claimant's upper extremities. An MRI performed on February 15, 2001, revealed claimant had a new herniated disk at C6-7. On November 20, 2001, Dr. Reed performed surgery on claimant which consisted of an anterior cervical discectomy and fusion at C6-7.

Dr. Reed noted that claimant still demonstrated long tract signs after the various surgeries. Dr. Reed referred claimant to Dr. Steve Simon, a physiatrist experienced in dealing with spinal cord injured patients. Dr. Reed noted claimant's long tract signs made him very similar to a spinal cord injury patient and claimant was exhibiting problems with spasticity in his upper and lower extremities. Dr. Reed agreed that over the course of treatment, claimant's long tract signs worsened. On September 9, 2002, Dr. Reed concluded claimant had reached maximum medical improvement.

Dr. Reed opined that claimant had suffered a 59 percent whole person permanent partial functional impairment including the rotator cuff or a 55 percent functional impairment excluding the rotator cuff injury. Dr. Reed concluded claimant could function in a sedentary occupation but he imposed restrictions against lifting over 10 pounds and noted it would be difficult for claimant to frequently ambulate due to the spasticity in claimant's lower extremities. Lastly, the doctor noted claimant's spasticity in his upper extremities would make repetitive as well as dexterous motion and movement of the claimant's upper extremities difficult.

The claimant testified that he experiences pain in his neck, back and upper and lower extremities. Claimant further noted that he experiences extreme spasticity in his upper and lower extremities. Claimant noted that he takes medication to control the spasticity and that the medication reduces his extremity spasticity to mild tremors and spasms. Claimant is receiving Social Security Disability benefits.

During the course of litigation, the ALJ referred claimant to Dr. Sergio Delgado for a court-ordered independent medical examination. Dr. Delgado examined claimant on December 11, 2002. Dr. Delgado's examination of claimant revealed an irregular gait with evidence of spasticity involving the right arm and right lower extremity. Dr. Delgado ultimately rated claimant with a 54 percent whole person permanent partial functional

impairment as a result of the injury suffered on July 10, 1999. The doctor further noted that claimant would have significant restrictions and he opined that he doubted claimant could participate in either active or sedentary work activities over an eight-hour period.

The ALJ determined that claimant is permanently and totally disabled. The Board agrees.

K.S.A. 44-510c(a)(2) (Furse 1993) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injuries suffered by the claimant were not injuries that raise a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) (Furse 1993), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.¹ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.²

An injured worker is permanently and totally disabled when rendered "essentially and realistically unemployable."³ In *Wardlow*⁴, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing

¹ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

² *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

³ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

⁴ *Id.*

body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

Respondent argues that statutory changes enacted in 1987 were not recognized by the Court of Appeals when it decided *Wardlow*. Respondent further argues that statutory change eliminated statutory construction in favor of the injured employee. Consequently, the respondent concludes the *Wardlow* standard, that if an injured worker is essentially and realistically unemployable he meets the statutory definition of permanent total disability, is flawed and should be disregarded. In essence, the respondent requests the Board to modify or reverse the findings in *Wardlow*. The Board does not have such jurisdiction or authority. Moreover, the Board notes the *Wardlow* decision has not been modified or reversed. Rather it has been cited and applied in decisions involving accidents that occurred after 1987.⁵ Accordingly, *Wardlow* still provides precedential guidance regarding what factors should be considered in the factual determination of what constitutes permanent and total disability.

In this case, the claimant has ongoing spasticity in both his upper and lower extremities that limits his ability to engage in substantial and gainful employment. The severity of claimant's condition is demonstrated by the significant functional impairment ratings that both Drs. Reed and Delgado provided the claimant. The court-ordered independent medical examiner, Dr. Delgado, concluded claimant would not be able to engage in either active or sedentary employment. Mr. Dick Santner, a vocational rehabilitation counselor, met with claimant to conduct a vocational assessment. Mr. Santner observed that claimant had difficulty maintaining his stability and that claimant occasionally had tremors in his hands. After reviewing claimant's work history, education and the medical reports of Drs. Delgado and Reed, Mr. Santner expressed the opinion that claimant was not employable in the open labor market. The Board affirms the ALJ's determination that claimant is permanently and totally disabled.

The Board is not unmindful that Dr. Reed opined that claimant would be able to perform sedentary work. And that respondent's vocational expert, Mr. Steve Benjamin, also expressed the opinion that, utilizing Dr. Reed's restrictions, the claimant would be able to obtain unskilled sedentary employment. However, as the ALJ noted, Mr. Benjamin was unable to identify any such jobs currently available. The Board concludes that the opinions of Dr. Delgado and Mr. Santner are more persuasive and more realistically recognize claimant's condition and significant impairments.

Respondent next argues that it is entitled to a credit for claimant's preexisting functional impairment. The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

⁵ *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. **Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.**⁶ (Emphasis added).

And functional impairment is defined by K.S.A. 1999 Supp. 44-510e, as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body **as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment**, if the impairment is contained therein. (Emphasis added.)

Consequently, the Act requires that before an award may be reduced for a preexisting functional impairment, the worker must have a functional impairment that is ratable under the AMA *Guides*⁷, if the impairment is contained in those *Guides*. Moreover, the Act requires that the amount of the functional impairment be established by competent medical evidence.

On the other hand, the Act does not require that the preexisting functional impairment was evaluated or rated before the later work-related accident. Nor does the Act require that the worker had been given work restrictions for the preexisting condition before the later work-related accident. Nonetheless, the Act does require that the preexisting condition must have actually constituted a rateable functional impairment.

The Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 44-501(c) reduction. In *Mattucci*,⁸ the Kansas Court of Appeals stated:

Hobby Lobby erroneously relies on *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987), and *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d 39, 611 P.2d 173 (1980), to support its position. In attempting to distinguish the facts of the present case, Hobby Lobby ignores that both *Baxter* and *Hampton* instruct that a previous disability rating should not affect the right to a subsequent award for permanent disability. *Baxter v. L.T. Walls Const. Co.*, 241 Kan. at 593; *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d at 41. Furthermore, the *Hampton* court declared that "settlement agreements regarding

⁶ K.S.A. 1999 Supp. 44-501(c).

⁷ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

⁸ *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2000) (copy attached pursuant to Sup. Ct. Rule 7.04).

a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury." 241 Kan. at 593.

It is clear that claimant had suffered a cervical injury and had a surgical anterior cervical discectomy at C5-6 before the July 10, 1999 accident. The claimant was provided an impairment rating and settled a workers compensation claim based upon the rating. But that rating cannot be used to establish the percentage of preexisting impairment because there is no indication that the rating provided was based upon the current version of the *AMA Guides*.

Dr. Delgado did offer an opinion based upon the *AMA Guides* that as a result of claimant's surgery at C5-6 he would have a 15 percent functional impairment. However, respondent failed to establish that claimant's current injuries aggravated this preexisting condition. After claimant's October 4, 1990 surgery at C5-6, he returned to work and did not observe any physical restrictions. After the injuries on July 10, 1999, claimant had surgeries at C4-5 and C6-7 but no additional surgery or repairs were necessary at the site of claimant's preexisting surgery. Simply stated, claimant's preexisting condition at C5-6 was not aggravated by the claimant's injuries on July 10, 1999. Consequently, the award should not be reduced for preexisting functional impairment under the provisions of K.S.A. 1999 Supp. 44-501(c).

Lastly, respondent argues that it made an overpayment of temporary total disability compensation. The authorized treating physician concluded claimant had reached maximum medical improvement on September 9, 2002. At that point claimant's condition was no longer temporary and was instead permanent. Claimant continued to receive temporary total disability compensation through October 15, 2002. As such claimant was overpaid for 5.29 weeks. Consequently, the Board finds respondent overpaid claimant temporary total disability compensation and the ALJ's Award will be modified to reflect that claimant was entitled to 112.71 weeks of temporary total disability compensation.

The Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above and further modifies the Award to reflect claimant is entitled to 112.71 weeks of temporary total disability compensation.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Brad E. Avery dated August 6, 2003, is modified to reflect claimant is entitled to 112.71 weeks of temporary total disability compensation.

The claimant is entitled to 61.86 weeks temporary total disability compensation at the rate of \$323.64 per week or \$20,020.37 followed by 50.85 weeks of temporary total disability compensation at the rate of \$330.80 per week or \$16,821.18 followed by

permanent total disability compensation at the rate of \$330.80 per week not to exceed \$125,000 for a permanent total general body disability.

As of March 18, 2004, there would be due and owing to the claimant 61.86 weeks of temporary total disability compensation at the rate of \$323.64 per week in the sum of \$20,020.37 plus 50.85 weeks of temporary total disability compensation at the rate of \$330.80 per week in the sum of \$16,821.18 plus 132 weeks of permanent total disability compensation at the rate of \$330.80 per week in the sum of \$43,665.60 for a total due and owing of \$80,507.15, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$44,492.85 shall be paid at \$330.80 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of March 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Judy A. Pope, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director